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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/888,818	06/25/2001	Michael R. Jacobson	64-4U1	9741

3624 7590 07/11/2003

VOLPE AND KOENIG, P.C.  
UNITED PLAZA, SUITE 1600  
30 SOUTH 17TH STREET  
PHILADELPHIA, PA 19103

EXAMINER

BHAT, NINA NMN

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 07/11/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

AS7

# Office Action Summary

Application No.

09/888,818

Applicant(s)

JACOBSON ET AL.

Examiner

N. Bhat

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-- Th MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 27 November 2002.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-98 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-98 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s) \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 6 6) ☐ Other:

**DETAILED ACTION**

1. Claims 1, 40,41, 43,44,45,46 and 88-98 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In all of applicant's independent claims applicant has used language which recites "...an acidulant in an amount no greater than about 0.5% equivalents of glacial acetic by weight.... and " a protein in an amount of less than 1% by weight of the composition. These recitations for the acidulant and the protein read on "zero" or no acidulant or no protein is in the composition. This is not what is taught by the specification especially having no acidulant in the composition. No greater than 0.5% equivalents can mean, no acidulant at all in the composition. Similarly, "protein in an amount less than 1%" can mean no protein is in the composition so essentially the composition comprises thickener and has a pH of not more than 4.6 and moisture of at least about 55%. The moisture phase acidity level of no more than about 1.5% again reads on zero. These limitations are critical to applicant's invention according the specification. Applicant is suggested to draft the claims so that a zero value for the acid, protein is present and the moisture phase acidity level is present. Regarding applicant's preamble, the preamble is given no weight especially since the only difference between the acidified imitation cheese sauce and that of a pudding is merely the preamble. The composition is the same whether it is an imitation cheese sauce or pudding. From reading the specification, it is believed that applicant did not intend this to be so. Applicant should add the cheese flavorings to distinguish the imitation cheese sauce from a pudding. If applicant is trying

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to claim a savory pudding or sweet pudding applicant should add some ingredient to distinguish between the different types of compositions. Applicant is reminded that if it is intended to have the preamble give life and meaning to the claim or to be limiting applicant should use both the preamble and the and reiterate the subject matter of the preamble in the body of the claim to be limiting, i.e., the preamble language provides antecedent basis for terms in the body of the claim. Note the case law of Allen Eng'g Corp. v. Bartell Indus., Inc., v. Darragh Co., 63 USPQ2d 1769, 1774 (Fed. Cir. 2002) Correction to the preambles and the body of the claims are required.

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. Claims 1-98 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bauer et al. WO 00/70970.

Bauer et al. teach the invention substantially as claimed.

Bauer et al. teach a ionic stable emulsion sauce which is shelf stable and has a pH of not more than 4.6 and includes a thickener, acidulant and protein within the ranges as claimed. Bauer et al. WO 00/70970 teaches on Page 4, line 18+, that a liquid sauce in order to fluid has a certain amount of water employed and must acidic to prevent bacteriological growth. A buffer solution is usually used in combination with the acid. Bauer et al. WO 00/70970 teaches on Page 5, line 22+ that the "hurdle" process is used to provide a pH of about 3.0 to 4.5 using high solid s and high levels of salt with the pH adjustments. Limiting the amount water and using selected well-known preservatives are known to the ordinary artisan. By controlling the acid, the water content, and buffer will synergistically improve the antimicrobial effects and improve shelf stability without negatively affecting the flavor. [Note Page 6, lines 4-11]. The buffers include sodium citrate, glucono-delta lactone as well as other known buffers such as sodium phosphate, sodium carbonate, sodium hexametaphosphate, etc. [Note Page 6, lines 25-28] The amount of buffer will be about 5 to 25% of the spice mix depending upon the pH desire. The sauce includes 20-40% water, 15-50% oil and about 25-65% solids. The sauce includes starches, gums, emulsifiers, and flavorings. The sauce includes xanthan gum and carboxy methylcellulose, other lipophilic starches can be used to which stabilizes the sauce and keeps the sauce in emulsion form. [Note Pages 8-10]. Bauer et al. WO 00/70970 further teaches that the emulsion sauce does have microbial kill and pasteurization is optional and the elimination of a heating requirement improves the flavored freshness of the product. The pH is 4.2 or lower or

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even 3.5 or 3.0 depending on taste. The pH must be below about 4.6, which is U.S. Code of Federal Regulations limit for low acid food. Depending on the pH and flavor desired in the sauce, the buffer in the seasoning mix is adjusted to control the pH for selected taste. Bauer et al. WO 00/70970 teach on Page 18-19 the preparation of an "Alfredo Sauce" or a cheese cream sauce which is a single phase emulsion non separating viscous product the sauce is white colored and has a cheesy salty flavor the pH is  $4.2 \pm 0.2$  the water activity is  $0.810 \pm 0.02$ .

However, applicant specific ratios of modified food starch to carboxymethyl cellulose, the moisture phase acidity level, viscosity, and fracturability is not specifically taught. The ratios, the moisture phase acidity level, viscosity, fracturability etc. are parameters which are well know to one of ordinary skill in the art and to manipulate or optimize the levels where a teaching of providing a sauce having a thickener, acidity, pH control, providing a viscous alfredo imitation cheese sauce has been broadly taught renders applicant's claims as a whole obvious. With respect to applicant's preamble and claims to a pudding, as explained above, the composition is basically the same as for the imitation cheese sauce and therefore unless applicant would amend the claims so that a dessert or pudding or sweet or savory pudding is specifically claimed, the sauce described by Bauer et al. WO 00/70970 would read on applicant's pudding composition since the composition includes a thickener, acidulant, and protein, the water activity and the moisture content of the composition is within the ranges as described by applicant. Bauer et al. teaches that the composition has a protein content of less than 2% and also teaches that the composition of the sauce can have a protein

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content of 1%. Less than 1% is not specifically taught however, it would have been obvious to one of ordinary skill in the art to limit the protein content of the sauce since basically applicant's concept of providing a shelf stable pH controlled low acid sauce is taught. Bauer et al. teach providing sauces, which can be used as an alfredo sauce or cheese sauce. Other sauces such as a spanish stir-in sauces, teriyaki sauces, lemon garlic stir in sauce, cheddar stir-in sauces have been taught described by Bauer et al. to adjust the composition to provide a shelf-stable sauce which is low acid that would not support the growth of spoilage microorganisms in the absence of pasteurization has been taught and to optimize the sauce as claimed by applicant would have been obvious as the reference does teach how one of ordinary skill in the art would modify and optimize the ingredients which provide a tasty sauce as well as providing an low acid, shelf stable sauce.


5. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Carpenter et al. teach an imitation cheese composition and products containing starch. The imitations cheese composition is made with less than 2% protein, 3%-30% starch 0-30% edible lipid material and bout 20%-60% water about 0.5-25% non-starch carbohydrates and 0.5% to about 5% hydrocolloid stabilizers and up to about 2% cheese flavor and upto to 2% color. Rapp teaches pudding composition and process for preparing puddings therefrom. Howard et al. teach shelf-stable rice products.

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6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to N. Bhat whose telephone number is 703-308-3879. The examiner can normally be reached on Monday-Friday, 9:30AM-6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-306-5665.



N. Bhat  
Primary Examiner  
Art Unit 1761

July 9, 2003